OAH 65-1901-23109

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF LABOR AND INDUSTRY

Ken B. Peterson, Commissioner,
Department of Labor and Industry,
State of Minnesota,

Complainant,

vs.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Gateway Building Systems, Inc.,

Respondent.

This matter came before Administrative Law Judge Ann O'Reilly for a contested case hearing on May 13 and 14, 2013. Post-hearing briefs were filed by the parties on July 25 and 26, 2013. The hearing record closed on July 26, 2013. Additional correspondence occurred on August 14, 2013, and October 11, 2013.

Jackson Evans, Assistant Attorney General, appeared on behalf of the Complainant, the Commissioner of the Department of Labor and Industry (Commissioner). Aaron Dean, Best and Flanagan, appeared on behalf of Respondent Gateway Building Systems, Inc. (Respondent or Gateway).

STATEMENT OF THE ISSUES

1. Whether Gateway employees violated Minn. R. 5207.1100, subp. 2, by occupying an elevated platform supported by a rough-terrain forklift without using personal fall arrest systems that meet the requirements of Code of Federal Regulations, title 29, section 1926.502(d), or positioning device systems that meet the requirements of Code of Federal Regulations, title 29, section 1926.502(e).

2. Whether the Commissioner has demonstrated by a preponderance of the evidence that Gateway knew of the violation or should have known of the violation with the exercise of reasonable diligence.

3. Whether Gateway has established the affirmative defense of unpreventable employee misconduct by proving by a preponderance of the evidence that it took steps to discover incidents of non-compliance with fall protection rules, and effectively enforced the rules whenever employees transgressed them.

4. Whether the penalty issued for the citation was appropriate given the size of the business and the employer, the gravity of the violation, the good faith of the employer, and the history of previous violations.

SUMMARY OF DECISION

The Commissioner established that Gateway employees violated Minn. R. 5207.1100, subp. 2,[1] on January 4, 2012, by working on an elevated platform supported by an all-terrain forklift without using fall protection devices, as required by the state and federal Occupational Safety and Health standards. A violation of fall protection standards creates a substantial probability that death or serious physical harm could result. Gateway, with the exercise of reasonable diligence, could have known of the violation. Therefore, the violation of Minn. R. 5207.1100, subp. 2, is correctly classified as a serious violation.

Gateway has failed to establish the affirmative defense of unpreventable employee misconduct. The Commissioner stipulates that Gateway had established work rules which required the use of fall protection when working on an elevated lift and that it adequately communicated those rules to its employees. However, Gateway failed to establish, by a preponderance of the evidence, that it took steps to discover incidents of noncompliance or that it effectively enforced fall protection rules whenever employees transgressed them. As a result, the citation issued for the violation of Minn. R. 5207.1100, subp. 2, is **AFFIRMED**.

In addition, the penalty imposed for this offense, which is 60 percent of the maximum penalty allowed by law for a serious violation, is reasonable and appropriate. Therefore, the penalty of $2,800 is **AFFIRMED**.

Based upon the evidence in the hearing record, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Respondent Gateway is a building contractor with offices in both Minnesota and North Dakota.[2] The Minnesota office is located in Elbow Lake.[3]

2. In late 2011, Gateway was hired to install a roof on a grain bin at the Mattson Dairy Farm in Farwell, Minnesota (Mattson Farm Project or Project).[4] The crew assigned to the Mattson Farm Project was from Gateway's Minnesota office.[5]

[1] All citations to Minnesota statutes and rules are to the 2012 version of the same, unless otherwise noted.
[2] Testimony of Jason Albertson.
[3] *Id.*
[4] Test. of Nick Buell.
[5] *Id.*

3. Five Gateway employees were assigned to the Mattson Farm Project: Tim Lewis (Lewis), the foreman and crane operator; Dale Beneke (Beneke), the forklift operator; and Nick Buell (Buell), Anthony Lambutis (Lambutis), and Brandon Sethre (Sethre), the laborers/millwrights.[6] (Lewis, Beneke, Buell, Lambutis and Sethre are collectively referred to herein as the "Gateway Crew" or "Crew.")

4. The Project began on December 29, 2011, and continued on December 30, 2011, January 2, 2012, and January 4, 2012.[7] According to foreman Lewis, the Mattson Farm Project was one of the "easiest" types of jobs that Gateway performed.[8]

5. The Mattson Farm contains three large grain bins, each exceeding 30 feet in height.[9] The bins are located next to each other in an open area.[10] The Gateway Crew was hired to construct and install a new roof on the center grain bin.[11]

6. The grain bins at the Mattson Farm are all cylindrical bins with cone-shaped roofs.[12] The construction of a grain bin roof begins on the ground, where a crew assembles the roof.[13] The roof consists of over 1,000 pieces.[14] When the cone-shaped roof is fully assembled, it is hoisted by crane to the top of the cylindrical bin.[15] There, it is manually attached to the cylinder with nuts and bolts which extend around the circumference of the bin.[16]

7. The attachment of the roof to the bin requires laborers both on the inside and the outside of the bin.[17] The outside workers drill holes and insert bolts; the inside workers attach nuts to the bolts to secure the roof to the cylinder.[18]

8. On January 4, 2012, the Gateway Crew planned to finish the ground assembly of the roof and attach it to the top of the bin.[19] The Crew began its shift at 7:30 a.m. and worked on the ground completing the roof assembly.[20] At approximately 10:30 or 11:00 a.m., the Crew completed the roof assembly and took an early lunch.[21] An early lunch was required because the next step in the construction process was hoisting the roof to the top of the bin and securing it with nuts and bolts.[22] Once a roof

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[6] *Id.*
[7] Test. of J. Albertson; Ex. 132.
[8] Test. of Tim Lewis.
[9] Test. of N. Buell.
[10] Test. of Ron Wallace.
[11] Test. of N. Buell; Ex. 137.
[12] Ex. 137.
[13] Test. of N. Buell.
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.;* Test. of Anthony Lambutis.
[21] Test. of N. Buell.
[22] *Id.*

is hoisted by a crane to the top of a bin, the crew cannot not stop working until the roof is securely attached to the structure.[23]

9. After a short lunch break, the Crew began the work of hoisting the roof onto the top of the bin.[24] The Project foreman, Lewis, was also the Crew's crane operator.[25] Buell and Lambutis were assigned to drill holes and install bolts on the outside of the bin.[26] Beneke, the forklift operator, was assigned to lift Buell and Lambutis approximately 30 feet in the air on a work platform or "man basket," which was attached to the forklift.[27] From the "man basket," Buell and Lambutis would work the remainder of the day drilling holes and installing bolts to secure the roof to the bin.[28] Sethre was the laborer assigned to go inside the grain bin and secure nuts to the bolts that Buell and Lambutis were drilling into the bin.[29]

10. Both the Minnesota Occupational Safety and Health Administration (MnOSHA) regulations and the more stringent Gateway safety policies require employees who are working on elevated platforms to wear personal fall protection devices.[30] Gateway's personal fall protection devices consist of harnesses that fasten around an individual's body and attach to a lanyard.[31] The lanyard is then attached to the elevated platform or structure from which the employee is working.[32] If an employee falls from the elevated surface, he will remain attached to the structure and suspended in the air by the lanyard, as opposed to falling to the ground.

11. Because much of Gateway's work involves work at heights, Gateway assigns each of its employees who work from elevated surfaces their own fall protection devices, which are adjusted to fit each employee snuggly.[33] Gateway's fall protection harnesses are bright red in color and are visible from a distance.[34] In this case, Buell and Lambutis' personal fall protection devices were located in a trailer on the job site, approximately 50 feet from the silo.[35]

12. The Mattson Farm Project required Buell and Lambutis to work at a height of approximately 30 feet.[36] Both Buell and Lambutis were quite comfortable working at

[23] *Id.*
[24] *Id.*
[25] Test. of T. Lewis.
[26] Test. of N. Buell.
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] Test. of J. Albertson.
[31] Test. of N. Buell.
[32] *Id.*
[33] *Id.*
[34] Test. of R. Wallace.
[35] Test. of N. Buell.
[36] *Id.*

heights, and regularly performed work on elevated surfaces.[37] In addition, both Buell and Lambutis worked frequently with foreman Lewis.[38]

13. Buell, in particular, was experienced in working at heights in excess of 100 feet and was known as Gateways' best "climber."[39] Buell's duties generally involved work on high silos, towers, or other structures where there were no platforms on which to work, and where he was secured to the structure only by his fall protection device.[40] Thus, for Buell, the Mattson Farm Project was considered an "easy" job since it required work at the relatively "low" height of 30 feet, and allowed him to work in a "man basket" that had a safety rail along the outside.[41]

14. Both Buell and Lambutis acknowledged knowing of, and being specifically trained on, MnOSHA rules and Gateway policies that require the use of fall protection devices when working from elevated platforms.[42] However, neither Buell nor Lambutis used their fall protection gear on January 4, 2012.[43] Instead, Buell and Lambutis proceeded into the "man basket" on the forklift and were lifted to the roof of the grain bin by Beneke without any fall protection equipment.[44]

15. Buell admitted that he noticed Lambutis was not wearing fall protection while working on the roof, but that he did not bring it to Lambutis' attention because it did not "seem like that big of a deal at the time."[45] According to Buell, the Mattson Farm Project was an "easier job" and was not a "risky" project.[46] Therefore, he did not think much of the fact that he and Lambutis were not wearing their fall protection devices that day.[47]

16. Lambutis states that he simply forgot to put on his fall protection gear.[48] Both Buell and Lambutis insist, however, that their failures to use fall protection on January 4, 2012, were isolated errors and that they usually wear their fall harnesses when working on elevated surfaces.[49]

17. Foreman Lewis explained that he did not notice that Buell and Lambutis were working without their fall protection gear because he was busy operating the crane on the other side of the grain bin and could not see the rest of his Crew while the roof was being attached to the bin.[50] Because Lewis was unable to see his Crew from his

[37] Test. of N. Buell; Test. of A. Lambutis.
[38] *Id.*
[39] Test. of N. Buell.
[40] *Id.*
[41] *Id*.
[42] Test. of N. Buell; Test. of A. Lambutis.
[43] *Id.*
[44] *Id*.
[45] Test. of N. Buell.
[46] *Id.*
[47] *Id.*
[48] Test. of A. Lambutis.
[49] Test. of N. Buell; Test. of A. Lambutis.
[50] Test. of T. Lewis.

position in the crane, and because the Crew was unable to see Lewis, the men were communicating through the use of two-way radios instead of the usual hand signals.[51]

18. To reduce the noise so that the Crew could hear the radios, Beneke turned off the power to the forklift, which was parked on an incline.[52] At approximately 12:22 p.m.,[53] the hydraulic brakes of the forklift malfunctioned and gave way, causing the forklift to topple over backwards.[54] Buell and Lambutis jumped from the "man basket" before the platform hit the ground.[55] While Buell and Lambutis sustained serious injuries as a result of the fall, both assert that had they been tethered to the "man basket" by their fall protection harnesses and lanyards, they may not have survived the accident.[56]

19. Following the accident, MnOSHA conducted an investigation.[57] MnOSHA's description of the accident is as follows, and is not materially disputed by Gateway for purposes of this hearing:

> On January 04, 2012, at approximately 12:22 p.m., two employees were working from a Haugen elevated work platform that was attached to an Ingersoll Rand VR-90B all-terrain forklift. At the time of the accident, the forklift was parked immediately adjacent to the grain bin on an inclined surface. Contacts #3 & 4 [Buell and Lambutis] were in the elevated platform approximately 30 feet above the ground level, attaching the bolts to the new corrugated metal roof that had been put into place on the grain bin. Contact #5 [Beneke] was at the controls of the forklift in the cab. According to Contact #1 [Lewis], Contact #5 [Beneke] cut the power to the forklift while the employees were in the elevated platform, because the employees were having troubles hearing each other over the noise of the engine. Shortly after Contact #5 [Beneke] cut the power to the forklift, the hydraulic brakes failed and the forklift began to roll backwards down the hill it had been parked on. After rolling backwards approximately 15-25 feet, the forklift fell over with the boom still extended approximately 30 feet in the air. Contact #1 [Lewis] stated that he believed the parking brake was engaged at the time of the accident. The employees were not equipped with fall arrest systems or positioning devices the day of the accident. Both employees sustained multiple broken bone injuries as a result of the fall while in the elevated work platform. Both employees were transferred to a hospital to treat their injuries.[58]

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[51] *Id.*
[52] Test. of R. Wallace; Ex. 1.
[53] The 911 call came in at 12:22 p.m., evidencing the time of the accident. *See,* Ex. 1.
[54] Test. of R. Wallace.
[55] Test. of N. Buell; Test. of A. Lambutis.
[56] *Id.*
[57] Test. of R. Wallace.
[58] *Id*. Ex. 1.

20. At the hearing, both Buell and Lambutis estimated that they got into the "man basket" and were elevated to the roof sometime between 11:45 a.m. and 12:00 p.m. on January 4, 2012.[59] However, in written statements made prior to the hearing, Buell and Lambutis provided different estimates of the time they began working in the lift. Lambutis stated that he had been in the elevated lift "less than two hours" prior to the accident.[60] Buell stated that he had worked in the lift "approximately four hours" prior to the accident – both before and after lunch.[61]

21. Both Buell and Lambutis disclaim their pre-hearing written statements, asserting that they were under the influence of pain medications at the time they provided those statements.[62] However, Gateway's legal counsel submitted Lambutis' Affidavit in support of Gateway's Motion for Summary Judgment. In addition, while Buell's statement was prepared by the Department's legal counsel, Buell admits that he revised the statement and had his attorney review it prior to execution.[63]

22. In their hearing testimony, Buell, Lambutis, and Lewis agreed that they were working on the elevated platform for anywhere between one-half hour to one hour prior to the accident, and that Lewis did not observe the Lambutis and Buell not wearing their fall protection gear because he was busy operating the crane on the other side of the grain bin.[64]

23. Both Buell and Lambutis received extensive and serious injuries as a result of the accident.[65] Buell suffered a shattered ankle, a broken leg, and a broken shoulder that required reconstructive surgery.[66] Lambutis suffered two broken bones in his arm, a shattered wrist, 10 broken ribs, a broken sternum, a collapsed lung, a lacerated spleen, and a brain bleed.[67]

24. On or about April 23, 2012, MnOSHA completed its investigation and held a first closing conference to advise Gateway that it intended to cite Gateway for violations related to the incident.[68]

25. On April 25, 2012, Gateway issued discipline notices to Lewis, Beneke, and Lambutis for their failure to follow fall protection protocols and other violations of Gateway safety policies.[69] Buell was issued a discipline notice at a later date because

[59] Test. of N. Buell; Test. of A. Lambutis.
[60] Affidavit of Anthony Lambutis, dated March 28, 2013, and submitted by Gateway in support of its Motion for Summary Disposition; Ex. 11.
[61] Statement of Nick Buell, dated March 27, 2013, and submitted by the Department in opposition to Gateway's Motion for Summary Disposition; Ex. 11.
[62] Test. of N. Buell; Test. of A. Lambutis.
[63] Test. of N. Buell.
[64] Test. of N. Buell; Test. of A. Lambutis; Test. of T. Lewis.
[65] Test. of N. Buell; Test. of A. Lambutis.
[66] Test. of N. Buell.
[67] Test. of A. Lambutis.
[68] Ex. 1.
[69] Ex. 120.

he had not yet returned to work and was still suffering with serious medical conditions.[70] In their disciplinary notices, the four employees were advised that they would not receive a pay raise for 2012 and that their eligibility for a year-end bonus would be evaluated at the end of the year.[71] Lewis acknowledges that he did, indeed, receive a year-end bonus for 2012 in lieu of a pay increase.[72]

26. Lambutis eventually returned to work at Gateway.[73] Buell, however, was unable to return to work until May 6, 2013 – just one week prior to the hearing in this matter.[74]

MnOSHA Citation and Penalty Calculation

27. On or about April 30, 2012, MNOSHA issued Gateway one Citation asserting two serious-level violations: Item 001, a violation of 29 C.F.R. § 1910.178 (a training-related citation); and Item 002, alleging violation of Minn. R. 5207.1100 (failure to use fall protection).[75] After reviewing Gateway's training documents, the Department rescinded Item 001 of the Citation; and that charge was dismissed and vacated by Order dated April 11, 2013.[76]

28. The remaining charge, Item 002, asserts a violation of Minn. R. 5207.1100, subp. 2, which provides:

> An employee, while occupying a boom-supported elevated work platform or a personnel elevating platform supported by a rough-terrain forklift truck, shall be protected from falling by the use of personal fall arrest systems that meet the requirements of Code of Federal Regulations, title 29, section 1926.502(d), or positioning device systems that meet the requirements of Code of Federal Regulations, title 29, section 1926.502(e).[77]

29. Gateway does not dispute that its employees were working on a forklift platform elevated over 20 feet and were not wearing the fall protection devices required under Minn. R. 5207.1100.[78] Gateway further stipulates that Minn. R. 5207.1100 applied and that the standard was, indeed, violated.[79]

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[70] Test. of J. Albertson.
[71] Ex. 120.
[72] Test. of T. Lewis.
[73] Test. of A. Lambutis.
[74] Test. of N. Buell.
[75] Summons and Notice to Respondent, Complaint, and Citations and Notifications of Penalty attached to the Notice and Order for Hearing and Prehearing Conference on file and of record in this matter.
[76] Order on Respondent's Motion for Summary Disposition, dated April 11, 2013.
[77] Citation and Notification of Penalty (Citation 01, Item 002).
[78] Hearing Transcript at pp. 12-16.
[79] *Id.* at 16.

30. Ron Wallace, the MnOSHA investigator assigned to the case, determined that the standard violated was a "serious violation" and calculated the penalty for the violation to be $2,800.[80] According to the MnOSHA Field Compliance Manual (MnOSHA Manual or Manual) Citation Rating Guide, a violation of Rule 5207.1100 involving a fall exposure of over 20 feet is a F-level serious violation.[81] The maximum penalty for a serious violation is $7,000 per violation.[82]

31. The MnOSHA Manual requires investigators to determine a "probability factor" when issuing citations and imposing penalties.[83] The "probability factor" is defined as "The probability that an injury or illness will occur due to a violative condition."[84] To determine probability, the MnOSHA guidelines require an evaluation of the employee exposure (i.e., how many employees were exposed to the hazard); the proximity the employees were to the hazard; the duration of the hazard (in terms of a percentage of the workday); and work conditions.[85]

32. To determine the probability factor, Wallace followed the MnOSHA Manual and applied a "2" for proximity (because the employees were required to work close to the edge of the "man basket"); a "1" for duration (because the violation/hazard lasted for 10 to 50 percent of the workday); and a "2 "for exposure (because two employees were exposed to the fall hazard).[86]

33. In determining the penalty to impose for a violation of Occupational Safety and Health standards and rules, the Commissioner shall consider the size of the business and the employer, the gravity of the violation, the good faith of the employer, and the history of previous violations.[87]

34. In considering the factors set forth in Minn. Stat. § 182.666. subd. 6, Wallace applied the following credits to the maximum fine amount ($7,000):

- Good faith of the employer, due to Gateway's established health and safety programs (20% credit);
- Lack of prior violation history in the last three years (10% credit); and
- Small size of employer (less than 150 employees) (30% credit).[88]

[80] Test. of R. Wallace.
[81] Ex. 2 at pp. 69, 70, 74, 144.
[82] *Id.* at 74. *See also*, Minn. Stat. § 182.666, subd. 2.
[83] Ex. 2 at 68.
[84] *Id.*
[85] *Id.*
[86] Test. of R. Wallace.
[87] Minn. Stat. § 182.666, subd. 6.
[88] Test. of R. Wallace.

35. Wallace applied a total of 60 percent in credits to the maximum fine amount.[89] Based upon this approach, Wallace imposed a fine of $2,800, which is 60 percent of the maximum penalty of $7,000.[90]

Gateway's Affirmative Defense of Employee Misconduct

36. On or about May 9, 2012, Gateway served a Notice of Contest and Service to Affected Employees (Notice) upon MnOSHA.[91] The Notice disputed the Citation, type of violation, abatement date, and penalty.[92] In a letter accompanying the Notice, Gateway first asserted "an employee misconduct defense."[93]

37. Because this defense was asserted after Wallace had completed his investigation and issued the citation, MnOSHA did not investigate the employee misconduct defense.[94]

38. The MnOSHA Manual, dated May 28, 2012,[95] recognizes an employer's affirmative defense of unpreventable employee misconduct.[96] The Manual provides that "Before issuing Citations to an employer with employees exposed to a hazard, it must first be determined whether the exposing employer has a legitimate defense to the Citation."[97] The Manual further provides:

> Burden of Proof
> Although affirmative defenses must be proved by the employer at the time of the hearing, MNOSHA must be prepared to respond whenever the employer is likely to raise or actually does raise an argument supporting such a defense, especially in fatalities, serious injury, or catastrophe cases. The case file shall contain documentation which refutes the more common defenses.[98]

39. The Department does not dispute that Gateway had established a work rule requiring the use of fall protection devices when working above six (6) feet and when working in a "man basket" attached to a forklift.[99] The Department also does not dispute that such rules were adequately communicated to Gateway's employees prior to

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[89] *Id.*
[90] *Id.*
[91] Ex. 103.
[92] *Id.*
[93] *Id.*
[94] Test. of R. Wallace.
[95] Notably, the Manual cited by Respondent is dated May 28, 2012. This post-dates the date of the accident and investigation in this case. However, the Department does not challenge the use of the Manual in this case or the existence of the "unpreventable employee misconduct" affirmative defense.
[96] Ex. 2 at p. 59. (Unpreventable Employee Misconduct or "Isolated Event" – The violative conduct was unknown to the employer and in violation of an adequate work rule which was effectively communicated and uniformly enforced through a disciplinary program.)
[97] *Id.* at p. 57.
[98] *Id* at p. 59.
[99] Hearing Transcript at pp. 12-14.

the accident.[100] Therefore, the Department stipulates that Gateway has established the first two prongs of the employee misconduct affirmative defense.[101] The focus of the hearing, however, was whether Gateway established the last two elements of the affirmative defense: whether Gateway took steps to discover noncompliance with fall protection safety rules; and whether Gateway effectively enforced those rules.

Evidence Related to the Employee Misconduct Defense

40. At the start of their employment with Gateway in 2010, both Buell and Lambutis were provided with fall protection training and were warned that surprise safety inspections could occur on job sites.[102] Buell and Lambutis each acknowledge that they were advised they could be disciplined or even fired if they were found in violation of a safety regulation during a surprise inspection.[103]

41. Buell denies witnessing any surprise inspections in the 16 months of his employment at Gateway prior to the accident.[104] Lambutis, however, asserts that he personally experienced more than 20 surprise job site visits during his career with Gateway.[105] Foreman Lewis also testified that Gateway management conducts surprise safety audits, but Lewis did not provide any specific details related to those audits.[106]

42. Norbert Tacner is a Superintendent for Gateway who oversees all Gateway foremen.[107] Tacner testified that, as a superintendent, he conducts surprise safety inspections to detect safety violations and enforce safety rules.[108] Tacner, however, was only a superintendent for a week or two prior to the January 4, 2012, accident.[109] Tacner did not testify that he conducted any surprise safety audits of foreman Lewis' jobsites.

43. Prior to his promotion to Superintendent, Tacner worked as a foreman for Gateway.[110] Tacner asserts that when he was a foreman, he received two site visits each week from his supervisors.[111] Site visits are not necessarily the same as safety audits.

44. Tacner insists that in his 10 years at Gateway, he has never seen or heard of any instances in which a Gateway employee was found not wearing a fall protection harness when one was required.[112] According to Tacner, "it just doesn't happen" that

[100] *Id.*
[101] *Id.*
[102] Test. of N. Buell; Test. of A. Lambutis.
[103] *Id.*
[104] Test. of N. Buell.
[105] Test. of A. Lambutis.
[106] Test. of T. Lewis.
[107] Test. of Norbert Tacner.
[108] *Id.*
[109] *Id.*
[110] *Id.*
[111] *Id.*
[112] *Id*.

Gateway employees get into elevated lifts without fall protection.[113] Tacner's testimony on this issue was as follows:

> **Gateway's Attorney Dean**: Have you ever – have you ever seen someone get into a man basket attached to a forklift or a crane basket attached to a crane who is not wearing their safety harness?
>
> **Tacner:** No.
>
> **Attorney Dean**: Have you ever heard of someone not wearing their safety harness?
>
> **Tacner**: No.
>
> **Attorney Dean:** OSHA has perhaps an understandable level of skepticism. They want – they believe that there have been prior instances. Can you tell the Judge – can you tell OSHA's lawyer, are you aware of any instance, at any office, in any state, where a Gateway employee was not wearing their safety harness? Are you aware of any?
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> **Tacner:** *There has never ever been a chance that's happened. I've been there for 10 years and I've never heard of it.*
>
> **Attorney Dean:** Is it the type of thing that could be kept quiet, it could have been kept secret?
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> **Tacner:** We're like a little family. Everybody talks and if it had happened, we would know about it.[114]

45. On cross examination and for purposes of impeachment, Tacner was confronted with Gateway's own records from two safety audits of worksites in North Dakota that occurred in 2009 and 2010.[115]

46. The first site audit was dated July 22, 2009, and arose out of a Gateway jobsite in Galesbury, North Dakota.[116] The 2009 audit report evidences that foreman Jon Jerdee's crew was discovered not wearing personal protective equipment (PPE) or fall protection gear.[117] The site inspection record notes that "Jon was warned and again reminded about the importance of PPE" and that "the crew got harness[es] after" the inspector arrived.[118] The audit report states:

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[113] *Id.*
[114] Hearing Transcript at 309-311 (emphasis added).
[115] Exs. 5 and 10.
[116] Ex. 5.
[117] *Id.*
[118] *Id.*

> Jon and his crew had no PPE and Jon stated he hated to admit it but he is not good at wearing PPE or using fall harnesses. Jon was told it is required and he must comply.[119]

47. No safety violations were issued to foreman Jerdee or his crew, and there was no evidence of any discipline imposed.[120]

48. The second site audit was dated July 7, 2010, and arose out of a Gateway jobsite in Arvilla, North Dakota.[121] The audit evidences that two members of foreman Jeff Michaels' crew were observed not wearing hard hats and that two men were observed in an aerial lift without safety harnesses.[122] Safety violations were dispensed as a result of the violations; and the foreman and two crew members received written warnings for the violations.[123] In addition, work was stopped for the day and the crew was sent home.[124]

49. Like Tacner, Buell, Lambutis, and Lewis all deny ever witnessing other employees failing to wear fall protection when required.[125] Lewis acknowledges working with both Buell and Lambutis on a regular basis but denies ever witnessing them in violation of fall protection regulations and rules.[126]

50. Both Buell and Lambutis insist that prior to January 4, 2012, they had always worn their safety harnesses while working at heights.[127] They assert that their actions on January 4, 2012, were isolated or "once-in-a-career" errors.[128] Both men acknowledge that they generally worked at heights without platforms (i.e., towers), where safety harnesses were their only protection from falling.[129] Thus, work in a "man basket" or elevated platform was fairly uncommon and considered "easier" work.[130]

51. Lewis acknowledges that, as a foreman, he is responsible for ensuring the safety of his crew, and, consequently, he is liable for the actions of his crew even if he does not have direct knowledge of their violations.[131]

52. Prior to the accident on January 4, 2012, Lewis was previously disciplined for a safety violation by a member of his crew.[132] In 2010, Lewis received a written

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[119] *Id.*
[120] Id.
[121] Ex. 10.
[122] *Id.*
[123] *Id. See also,* Ex. 140.
[124] Test. of J. Albertson.
[125] Test. of N. Buell; Test. of A. Lambutis; Test. of T. Lewis.
[126] Test. of T. Lewis.
[127] Test. of N. Buell; Test. of A. Lambutis.
[128] *Id.*
[129] *Id.*
[130] Test. of A. Lambutis.
[131] Test. of T. Lewis.
[132] Ex. 128 at GBS-000115.

warning notice because a member of his crew was not wearing proper PPE (a face shield).[133] That safety violation resulted in an injury to the non-complying employee.[134]

53. Buell and Lambutis confirmed that there was no site-specific fall protection plan for the Mattson Farm Project, and that Lewis did not communicate specific fall protection requirements to the Crew.[135] While MnOSHA regulations do not require a site-specific all protection plan, Gateway's Employee Safety Handbook recommends that site-specific plans be prepared and fall protection be assessed for each project.[136]

54. Lewis explained that a site-specific fall protection plan was unnecessary for the Mattson Farm Project because it was an "easy project" and he was working with experienced laborers who had been previously trained on their obligation to wear fall protection.[137] Therefore, Lewis did not see the need to remind Buell or Lambutis to follow the fall protection rules.[138] Buell and Lambutis concede that had Lewis addressed fall protection with them at a Project meeting or prepared a site-specific fall protection plan, it would have been more likely that they would have been wearing their fall protection gear on January 4, 2012.[139]

55. Buell testified that he regularly worked on Lewis' crews and that it was the laborers' responsibility, not the foreman's responsibility, to ensure that fall protection was used.[140] Both Buell and Lambutis accept personal responsibility for their failure to comply with the fall protection requirements.[141]

56. Jason Albertson (Albertson), Gateway's Safety Director, is responsible for training employees and ensuring staff compliance with safety regulations.[142] Albertson has worked at Gateway since March 2010, and reports directly to Gateway's owner, Kevin Johnson.[143] Albertson is responsible for surprise safety audits and site inspections, and, according to Albertson, spends half his time conducting such visits.[144] At his disposal are two company airplanes to get him to jobsites in both North Dakota and Minnesota.[145] Albertson states that he personally performed over 200 site visits during 2011.[146]

57. Buell, however, noted in his signed statement dated March 27, 2013, that:

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[133] *Id.*
[134] *Id.*
[135] *Id.*
[136] Ex. 104 at 90-91.
[137] Test. of T. Lewis.
[138] *Id*.
[139] Test. of N. Buell; Test. of A. Lambutis.
[140] Test. of N. Buell.
[141] Test. of N. Buell; Test. of A. Lambutis.
[142] Test. of J. Albertson.
[143] *Id.*
[144] *Id.*
[145] *Id.*
[146] *Id.*

> I worked at Gateway at approximately 50-75 job sites. There were never really any surprise audits. I believe Jason came to two of the jobsites I worked on to do an inspection.[147]

58. Albertson explained that Gateway project managers are also responsible for surprise inspections and that he personally trains them to conduct such audits.[148] Albertson recommends that supervisors conduct two site visits per week for each project.[149]

59. Albertson testified that he has previously disciplined Gateway's employees and subcontractors for failure to comply with fall protection requirements.[150] Albertson issued a written warning to foreman Jeff Michels and his crew in July 2010 for failing to use PPE and fall protection (see above).[151] In addition, in 2011, Albertson removed an employee of a subcontractor from a jobsite for climbing steel without fall protection; and stopped a subcontracted crew from working one day because they did not have sufficient PPE.[152]

60. Gateway submitted documentation of five safety audits conducted in 2010 and 20 safety audits conducted in 2011.[153] Gateway had approximately 363,000 man hours logged in 2010, and approximately 400,000 man hours and over 300 jobs in 2011.[154]

61. Albertson explained that most of his safety audits are not documented because they are informal.[155] In addition, Albertson noted that safety audit documents are kept in the individual project files and were difficult for him to locate for the hearing.[156] Therefore, Albertson contends that Gateway performed more safety audits in 2010 and 2011 than he was able to document.[157]

62. Albertson acknowledged that he was unable to identify any documented incidents of a Gateway foreman detecting a fall protection violation.[158] This is consistent with Buell's signed, written statement in which Buell stated:

> At Gateway, a foreman is not really going to discipline you for not wearing fall protection. If a foreman finds you without fall protection, he will just tell you to put it on. It's only if the foreman catches you a second time that you will be formally disciplined.

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[147] Ex. 11.
[148] *Id.*
[149] *Id.*
[150] *Id.*
[151] Ex. 5.
[152] Test. of J. Albertson; Ex. 127.
[153] Exs. 126 and 127.
[154] Test. of J. Albertson.
[155] *Id.*
[156] *Id.*
[157] *Id.*
[158] *Id.*

> Jason [Albertson], the safety director, he would probably discipline you for not wearing fall protection….[159]

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

1. The Commissioner of Labor and Industry and the Administrative Law Judge have jurisdiction in this matter pursuant to Minn. Stat. §§ 182.661, subd. 3 and 14.50.

2. The Department provided proper notice of the citations, penalties, and hearing in this matter, and has fulfilled all relevant procedural requirements of rule and law.

Violation of Minn. R. 5700.1100, subp. 2

3. Respondent is an employer as defined by Minn. Stat. § 182.651, subd. 7.

4. Minnesota Statutes section 182.653, subdivision 3, requires each employer to comply with Occupational Safety and Health standards and rules adopted pursuant to Minn. Stat. ch. 182.

5. The Commissioner has adopted Occupational Safety and Health rules, Minn. R. 5207, under the authority provided in Minn. Stat. § 182.655. Minnesota Rules Part 5207.1100, subpart 2, provides:

> An employee, while occupying a boom-supported elevated work platform or a personnel elevating platform supported by a rough-terrain forklift truck, shall be protected from falling by the use of personal fall arrest systems that meet the requirements of Code of Federal Regulations, title 29, section 1926.502(d), or positioning device systems that meet the requirements of Code of Federal Regulations, title 29, section 1926.502(e).

6. The Commissioner has the burden of establishing a violation of an Occupational Safety and Health rule or regulation by a preponderance of the evidence.[160]

7. Gateway concedes, and the Commissioner has established by a preponderance of the evidence, that Gateway violated Minn. R. 5207.1100, subp. 2, by allowing two of its employees to occupy a boom-supported elevated work platform

[159] Ex. 11.
[160] Minn. R. 1400.7300, subp. 5.

supported by a rough-terrain forklift without wearing personal fall arrest systems meeting the requirements of 29 C.F.R. § 1926.502(d) or positioning device systems meeting the requirements of 29 C.F.R. § 1926.502(e).

Serious Violation

8. Minnesota Statutes section 182.651, subdivision 12, defines a "serious violation" of state work safety standards as:

> [A] violation of any standard, rule, or order which creates a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such a place of employment, *unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.*[161]

9. The Commissioner has established that Gateway's violation of Minn. R. 5207.1100, subp. 2, was a "serious violation" because there was a substantial probability that death or serious physical harm could result from the violation. In addition, the Commissioner has established by a preponderance of the evidence that Gateway knew or could have known of the presence of the violation with the exercise of reasonable diligence.

Unpreventable Employee Misconduct Defense

10. Courts and MnOSHA have recognized the affirmative defense of unpreventable or unforeseeable employee misconduct in OSHA cases.[162] An employer is shielded from liability for workplace safety violations under the affirmative defense of "unpreventable employee misconduct" if the employer:

> (1) Established a work rule to prevent the reckless behavior or unsafe condition from occurring;
>
> (2) Adequately communicated the rule to its employees;
>
> (3) Took steps to discover incidents of noncompliance; and
>
> (4) Effectively enforced the rules whenever employees transgressed it.[163]

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[161] Emphasis added.

[162] The parties stipulate to the four elements of the unpreventable employee misconduct affirmative defense. *See* Hearing Transcript at pp. 12-16

[163] *Modern Continental Construction Company, Inc. v. Occupational Safety and Heath Review Commission,* 305 F.3d 43, 51 (1st Cir. 2002), *citing P. Gioioso & Sons, Inc. v. Occupational Safety and Health Review Commission,* 115 F.3d 100, 109 (1st Cir. 1997); *See also, Valdak Corporation v. Occupational Safety and Health Review Commission,* 73 F.3d 1466, 1469 (8th Cir. 1996) ("To establish

11. In applying the four factors of the employee misconduct defense, courts have held that "[T]he proper focus in employee misconduct cases is on the effectiveness of the employer's implementation of its safety program."[164]

12. As an affirmative defense, Gateway bears the burden of establishing all four elements of the defense by a preponderance of the evidence.[165]

13. The Commissioner concedes that Gateway has established that it established a work rule requiring the use of fall protection equipment when employees are working on elevated platforms supported by rough-terrain forklifts, including work in "man baskets" attached to the boom of a forklift.

14. The Commissioner concedes that Gateway has further established that it adequately communicated its rules related to the mandatory use of fall protection gear to its employees.

15. Gateway has failed to establish by a preponderance of the evidence that it took steps to discover incidents of noncompliance with fall protection rules and regulations.

16. Gateway has also failed to establish by a preponderance of the evidence that it effectively enforced fall protection rules whenever employees transgressed them.

17. Therefore, Gateway has failed to establish the defense of unpreventable employee misconduct and the MnOSHA citation for violation of Minn. R. 5207.1100, subp. 2 is **AFFIRMED**.

Appropriateness of Penalty

18. An employer who has received a citation for a serious violation of its duties under Minn. Stat. § 182.653, or any standard, rule, or order adopted under the authority of the Commissioner as provided in Minn. Stat. ch. 182, shall be assessed a fine not to exceed $7,000 for each violation.[166]

19. Under Minn. Stat. § 182.666, subd. 6, the Commissioner has authority to assess fines giving due consideration to the appropriateness of the fine with respect to the size of the business and the employer, the gravity of the violation, the good faith of the employer, and the history of previous violations.

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the defense of unforeseeable employee misconduct, [the employer] must prove that it had a work rule in place which implemented the standard, and that it communicated and enforced the rule.")

[164] *Valdak,* 73 F.3d at 1469*, citing Brock v. L.E. Myers Co., High Voltage Div.,* 818 F.2d 1270 (6th Cir. 1987), *cert. denied L.E. Myers Co., High Voltage Div. v. Secretary of Labor,* 108 S.Ct. 479 (1987)).

[165] Minn. R. 1400.7300, subp. 5.

[166] Minn. Stat. § 182.666, subd. 2.

20. The Commissioner has established that the penalty of $2800 is appropriate in this case based upon the size of Gateway's business, the gravity of the violation, Gateway's good faith, and Gateway's lack of previous violations. Therefore, the penalty of $2,800 is **AFFIRMED**.

ORDER

IT IS HEREBY ORDERED that:

1. The MnOSHA Citation 1, Item 002, issued in Inspection No. 316261874 for the violation of Minn. R. 5207.1100, subp. 2, is **AFFIRMED**.

2. A penalty in the amount of **$2,800** is **AFFIRMED**.

Dated: October 22, 2013

s/Ann O'Reilly
ANN O'REILLY
Administrative Law Judge

Reported: Digitally recorded; Transcript prepared, Kirby A. Kennedy & Associates

NOTICE

Pursuant to Minn. Stat. § 182.661, subd. 3, this Order is the final decision in this case. Under Minn. Stat §§ 182.661, subd. 3, and 182.664, subd. 5, the employer, employee or their authorized representatives, or any party, may appeal this Order to the Minnesota Occupational Safety and Health Review Board within 30 days following service by mail of this Decision and Order.

MEMORANDUM

The parties do not dispute that a violation of Minn. R. 5207.1100, subp. 2, occurred on January 4, 2012. Instead, the issues in this case are: (1) whether the violation was a "serious violation;" (2) whether the affirmative defense of unpreventable employee misconduct applies to excuse Gateway for the violation; and (3) whether the penalty imposed was appropriate.

Serious Violation

At the outset, it is important to review the safety standard that the Gateway employees violated. Minnesota Rules Part 5207.1100, subpart 2, expressly provides:

> An employee, while occupying a boom-supported elevated work platform or a personnel elevating platform supported by a rough-terrain forklift truck, shall be protected from falling by the use of personal fall arrest systems that meet the requirements of Code of Federal Regulations, title 29, section 1926.502(d), or positioning device systems that meet the requirements of Code of Federal Regulations, title 29, section 1926.502(e).[167]

It is undisputed that two Gateway employees were working on an elevated platform supported by a forklift and that neither employee on that platform was wearing his required fall protection. There is no dispute that these employees were in blatant violation of the standard.

Minnesota Statute section 182.651, subd. 12, defines a "serious violation" of state work safety standards as:

> [A] violation of any standard, rule, or order which creates a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such a place of employment, *unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.*[168]

It is not disputed that a failure to use required fall protection devices when working at heights creates a substantial probability that death or serious physical harm could result. Obviously, fall protection standards are in place to prevent such harm. Gateway, however, contends that it did not know, and that it could not have known, of the violation. Gateway's argument ignores the important duties and responsibilities that Gateway entrusts to its supervisors and foremen.

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[167] *See,* Citation and Notification of Penalty (Citation 01, Item 002).
[168] Emphasis added.

The law imposes upon employers the duty to ensure that their workers are adequately protected from workplace dangers. To fulfill that duty, Gateway not only imposes stringent safety rules; it employs safety directors, superintendents, project managers, and foreman to ensure such rules are abided by and enforced. Foreman, who are on the jobsite and overseeing a project on a day-to-day basis, are the Gateway supervisors with the most direct and consistent opportunities to ensure workplace safety. By appointing a job foreman, Gateway delegates its duty to enforce state and company safety regulations. While other supervisors may also enforce these rules, it is the foremen who are on the front lines, and are entrusted by Gateway to oversee and direct the work of its employees.

Gateway asserts that it did not know that its employees (Buell and Lambutis) were violating Minn. R. 5207.1100 on January 4, 2012, because its foreman, Lewis, was busy operating a crane and did not see the employees enter the "man basket" without fall protection gear. Gateway asserts that because Lewis did not know of the violations, Gateway did not know about the violation. Inherent in this argument is Gateway's acknowledgement that Lewis was the eyes and ears of the company that day.

Gateway is correct in this assertion. Gateway was delegating its legal duties to its foreman to ensure that its employees were complying with the law. However, the fact that Lewis did not actually observe the employees violate the law does not absolve Gateway of its duty to comply. The law imposes an additional requirement that an employer exercise "reasonable diligence" to know of the presence of violations. Without this additional requirement, an employer could simply turn a blind eye to violations and escape liability by asserting ignorance.

Here, Lewis, as Gateway's supervisory representative and delegate, had the affirmative duty to exercise reasonable diligence to discover violations before tragedy struck. However, Lewis was busy manning the crane and did not ensure that his Crew complied with the safety regulations. With reasonable diligence, Lewis could have ensured his Crew was properly equipped and prepared for the task before hoisting the roof to the top of the bin.

As Gateway's own Employee Safety Handbook advises, fall protection requires "careful planning and preparation" and an "assessment of each fall situation at a given jobsite."[169] Buell and Lambutis acknowledge that had Lewis addressed fall protection at the Mattson Farm jobsite, they would have likely remembered to use their fall protection devices. Whether that would have resulted in more serious injuries or death, no one will ever know. Nonetheless, the fact remains that Lewis did not exercise reasonable diligence to ensure that his Crew was compliant with the fall protection regulations.

As Lewis acknowledged, his Crew was experienced in working at heights and the Mattson Farm Project was considered relatively "easy." Therefore, as the accident evidences, all members of the Crew – including its foreman -- let down their guard and

[169] Ex. 104 at p. 91.

were lax with safety regulations. Unfortunately, those are the situations in which accidents frequently occur.

The violation of the fall protection requirements presents a serious risk of harm or death. Because the violations could have been discovered by Lewis through reasonable diligence, Gateway cannot evade its legal duty by simply asserting ignorance. Accordingly, the violation of Minn. R. 5207.1100, subp. 2, was correctly classified as a "serious violation," subjecting Gateway to a maximum penalty of $7,000 per violation.

Unpreventable Employee Misconduct Defense

Consistent with Minnesota's definition of a "serious violation," federal courts and MnOSHA have recognized the affirmative defense of unpreventable or unforeseeable employee misconduct in OSHA cases. Under this defense, an employer is shielded from liability for workplace safety violations if the employer: (1) established a work rule to prevent the reckless behavior or unsafe condition from occurring; (2) adequately communicated the rule to its employees; (3) took steps to discover incidents of noncompliance; and (4) effectively enforced the rules whenever employees transgressed it.[170]

In applying these factors, courts have held that "[T]he proper focus in employee misconduct cases is on the effectiveness of the employer's implementation of its safety program."[171] As an affirmative defense, the employer must shoulder the burden of proving all four elements of the defense.[172] "Sustaining this burden requires more than pious platitudes: 'an employer must do all it feasibly can to prevent foreseeable hazards, including dangerous conduct by its employees.'"[173] Thus, it is Gateway's burden to prove, by a preponderance of the evidence, all four prongs of the affirmative defense.

The Commissioner stipulates that Gateway had established work rules requiring the use of fall protection when working on elevated platforms, and that the fall protection rules were adequately communicated to Gateway employees. Therefore, Gateway has established the first two elements of the defense. However, in order to reach the safe harbor of the affirmative defense, Gateway must establish by a preponderance of the evidence that it also took steps to discover incidents of noncompliance with fall

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[170] *Modern Continental Construction Company, Inc. v. Occupational Safety and Heath Review Commission,* 305 F.3d 43, 51 (1st Cir. 2002), *citing P. Gioioso & Sons, Inc. v. Occupational Safety and Health Review Commission,* 115 F.3d 100, 109 (1st Cir. 1997); *See also, Valdak Corporation v. Occupational Safety and Health Review Commission,* 73 F.3d 1466, 1469 (8th Cir. 1996) ("To establish the defense of unforeseeable employee misconduct, [the employer] must prove that it had a work rule in place which implemented the standard, and that it communicated and enforced the rule.")

[171] *Valdak,* 73 F.3d at 1469*, citing Brock, supra*.

[172] *P. Gioioso & Sons, Inc. v. OSHRC*, 115 F.3d 100, 109 (1st Cir. 1997). *See also, Brock, supra*; *General Dynamics Corp. v. OSHRC,* 599 F.2d 463, 459 (1st Cir. 1979).

[173] *Gioioso*, 115 F.3d at 109, *citing General Dynamics*, 599 F.2d at 458; *accord H.B. Zachry Co. v. OSHRC,* 638 F.2d 812, 818 (5th Cir. 1981).

protection rules; and that it effectively enforced the rules whenever employees transgressed them.

A "preponderance of the evidence" means that the ultimate facts must be established by a greater weight of the evidence.[174] "It must be of a greater or more convincing effect and … lead you to believe that it is more likely that the claim … is true than … not true."[175] In other words, if it is more likely than not that Gateway took steps to discover noncompliance and effectively enforced its rules, then Gateway has met its burden. In contrast, if the evidence casting doubt on any one of the elements of Gateway's affirmative defense is stronger and more persuasive, then Gateway has failed to meet its burden and the citation should be affirmed.

It is well-established that when "a supervisor is involved ... the proof of unpreventable employee misconduct is more rigorous and the defense is more difficult to establish since it is the supervisor's duty to protect the safety of employees under his supervision."[176] This is because "a supervisor's failure to follow the safety rules and involvement in the misconduct is strong evidence that the employer's safety program was lax."[177] Thus, when the alleged misconduct was in the presence of a supervisory employee, the employer must further establish that it took all feasible steps to prevent the accident, including adequate instruction and supervision of its supervisory employee."[178] The involvement of a supervisor in misconduct is not limited to the supervisor's own violation of a safety standard, but also includes a supervisor's failure to notice a rule violation when reasonable diligence would uncover the same, or allowing subordinates to violate safety rules without sanction.[179]

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[174] 4 Minnesota Practice, CIV JIG 14.15 (2012).

[175] *State v. Wahlberg*, 296 N.W.2d 408, 418 (Minn. 1980).

[176] *Archer-Western Contractors, Ltd.*, 1991 WL 81020, 15 O.S.H. Cas. (BNA) 1013, 1017 (O.S.H.R.C. Apr. 30, 1991).

[177] *Sec'y of Labor v. Ceco Corp.*, 1995 WL 215397, 17 O.S.H. Cas. (BNA) 1173, 1176 (O.S.H.R.C. Apr. 12, 1995). *See also Brock,* 818 F.2d at 1277 ("In cases involving negligent behavior by a supervisor or foreman which results in dangerous risks to employees under his or her supervision, such fact raises an inference of lax enforcement and/or communication of the employer's safety policy."); *Donovan v. Capital City Excavating Co., Inc.,* 712 F.2d 1008, 1010 (6th Cir.1983) (actions of supervision are imputed to the company); *Nat'l Realty & Constr. Co. v. OSHRC,* 489 F.2d 1257, 1267 n. 38 (D.C.Cir.1973) ("[T]he fact that a foreman would feel free to breach a company safety policy is strong evidence that implementation of the policy was lax."); *Complete Gen. Constr. Co.,* 20 O.S.H. Cas. 1413 (No. 02–1896, 2003), *aff'd* 2005 WL 712491 (6th Cir. March 29, 2005) (per curiam) ("[N]egligent behavior by a supervisor or foreman ... raises an inference of lax enforcement and/or communication of the employer's safety policy."); *Secretary of Labor v. 4 State Trucks,* 2009 WL 3361400 at *7, 22 O.S.H. Cas. (BNA) 1929 (O.S.H.R.C.A.L.J. Aug. 25, 2009) ("A supervisor's failure to comply with a workrule, plus the employees' willingness to break the workrule in the supervisor's presence, indicate lax enforcement or communication of the workrule.").

[178] *Daniel International Co. v. OSHRC,* 683 F.2d 361, 364 (11th Cir. 1982).

[179] *See e.g., D.A. Collins Const. Co., Inc. v. Secretary of Labor*, 117 F.3d 691, 695 (2nd Cir. 1997) (Holding that supervisors who do not take steps to discover violations of safety procedures evidence that employer's safety program was not being adequately enforced.); *Gioioso,* 115 F.3d 100 (employer's implementation of safety procedures was inadequate where a foreman, as a supervisor, did not intervene in unsafe employee practices); *Brock,* 818 F.2d at 1277 ("In cases involving negligent behavior by a supervisor or foreman which results in dangerous risks to employees under his or her supervision, such fact raises an inference of lax enforcement and/or communication of the employer's safety policy.").

Here, Lewis was present on the job site with Buell and Lambutis for four days. Throughout that time, it was Lewis' duty to ensure that his Crew was following all safety requirements. By making him a foreman, Gateway delegated to Lewis the authority to supervise its employees and ensure compliance with the law. Therefore, Lewis' actions or his inaction is properly imputed to Gateway.

While Gateway's own policies required that fall protection be addressed in every job that required working at heights over six feet or in a forklift basket, Lewis did not remind his Crew of that requirement or properly supervise the Crew to ensure they were complying with company policy or the law. Instead, Lewis admits that he was busy operating the crane and left the responsibility of complying with fall protection rules to his subordinates, Buell and Lambutis. According to Lewis, the Mattson Farm Project was a relatively easy job, and Buell and Lambutis were experienced at working at heights. Therefore, Lewis did not believe he needed to carefully supervise the employees and remind them to comply with fall protection requirements. Buell confirms this understanding in his own testimony when he stated that fall protection was his responsibility, not his foreman's obligation.

The totality of the circumstances suggests that because the members of the Crew viewed the Project as "easy" and routine, they let down their guard and Lewis' enforcement of the safety practices on the Project was lax. Both Buell and Lambutis were used to working at far higher heights and without the safety of a "man basket" in which to work. Indeed, Buell was accustomed to working at heights over 100 feet, where the only protection from falling was his safety harness. Thus, working in a forklift basket appeared to him to be "not risky." Lewis admitted that he did not believe he needed to remind his Crew of the safety rules or police their actions because of their experience. Consequently, Lewis provided a lack of supervision and failed to enforce the rules -- duties which Gateway had delegated to him and for which Gateway is ultimately responsible.

Gateway presented a great deal of testimony that its supervisory employees, including its Safety Director (Albertson) and the Superintendent (Tacner), made unannounced visits to jobsites; and that such visits were intended to discover violations and enforce safety rules. However, Gateway was only able to document five site safety audits in 2010, and only 20 in 2011.[180] According to Albertson, Gateway performed well over 300 jobs in 2011.[181] Thus, having only 20 safety audits in 2011 does not establish, by a preponderance of the evidence, that Gateway took adequate steps to uncover incidents of noncompliance or effectively enforce safety rules.

Tacner, the supervisor of all Gateway foremen, testified that he did not believe that *any* Gateway employee had *ever* violated fall protection regulations.[182] According to Tacner, there had never "been a chance" that Gateway employees disregarded fall

[180] Exs. 126 and 127.
[181] Test. of J. Albertson.
[182] Test. of N. Tacner.

protection rules prior to January 4, 2012.[183] The reality, however, was quite different. Not only did it occur on January 4, 2012, it had also occurred on two prior occasions - in 2010 and 2011.[184]

What Tacner's testimony suggests is that Gateway's managerial staff was out of touch with the realities of the field where foremen were not taking adequate responsibility for enforcing fall protection rules. As Buell originally stated in his signed and written statement of March 27, 2013, "At Gateway, a foreman is not really going to discipline you for not wearing fall protection. If a foreman finds you without fall protection, he will just tell you to put it on…."[185]

This was not a situation where just one employee willfully disobeyed or secretly ignored safety regulations. Here, both Buell and Lambutis – who had regularly worked with foreman Lewis – entered the "man basket" and proceeded to work at an elevated height without fall protection. The violation was open and obvious. The violation lasted for at least 30 minutes and likely continued up to two to four hours, according to the original statements of Lambutis and Buell. Watching them this entire time was Beneke, the forklift driver, who also ignored the safety rules. To have three, experienced members of a five-member Crew completely disregard safety requirements – and to have their own foreman present on the job and not even notice the violations – indicates an accepted disregard for the rules and insufficient enforcement or supervision.

The fact that *both* Buell and Lambutis ignored the rules; the fact that a third co-worker (Beneke) observed the employees for an extended period of time and did not voice concern; and the fact that a Gateway foreman was present on the jobsite but failed to discover noncompliance or enforce the rules prevents Gateway from satisfying its burden of proof in this matter. Having the burden of proof requires that Gateway not only rebut the Commissioner's case, but affirmatively prove, by a preponderance of the evidence, that it met all elements of its defense.

To allow an employer to escape liability for workplace safety violations where its own supervisor was present during the violation but failed to observe and enforce the safety rules would turn the concept of employer responsibility for occupational safety on its head. It would allow the unpreventable employee misconduct defense to defeat the safety standards, so long as the supervisor did not personally witness the violation. In this way, it would discourage careful supervision of employees and negate a foreman's responsibility as the employer's "eyes and ears" on the project.

The defense of "unpreventable employee misconduct" or "unforeseeable employee misconduct" necessarily requires that the safety violation be "unpreventable" or "unforeseeable" from the employer's standpoint. Such is not the case here. Buell's and Lambutis' violations of the rules were preventable and reasonably foreseeable by Gateway's delegated enforcement agent, foreman Lewis. Lewis did not address fall

[183] *Id.*
[184] Exs. 5 and 10.
[185] Ex. 11.

protection with his Crew during the Project or take any steps at all to ensure that his Crew was complying with the requirements. He did not prepare a site specific fall protection plan; he did not remind his Crew to wear their fall protection harnesses; and he did not take steps to supervise his Crew's work so as to enforce the rules. Instead, he abdicated the responsibility of complying with fall protection to his subordinates without further oversight or enforcement. Therefore, Gateway cannot take refuge in its supervisor's neglect of supervision.

Under the facts presented, Gateway has failed to establish that it took the necessary steps on January 4, 2012, to discover incidents of noncompliance with fall protection rules; or that it consistently and effectively enforced the rules when employees transgressed them. As a result, Gateway is liable for the undisputed violation of Minn. R. 5207.1100, subp. 2.

Appropriateness of Monetary Penalty

Under Minn. Stat. § 182.666, subd. 6, the Commissioner has authority to assess fines giving due consideration to the appropriateness of the fine with respect to the size of the business and the employer, the gravity of the violation, the good faith of the employer, and the history of previous violations. The maximum monetary penalty for a "serious violation" is $7,000.[186]

Here, MnOSHA applied 60 percent credit to reduce the amount of the fine to $2,800. Due to Gateway's established health and safety programs, MnOSHA investigator Wallace gave Gateway a 20 percent credit for good faith. He also gave Gateway the maximum credit allowed for history (10 percent), since Gateway had no history of similar violations in the last three years. Finally, Wallace applied a standard 30 percent credit for the size of Gateway's operation (150 employees). Each of these credit applications are reasonable and appropriate.

Gateway contends that the amount of the penalty was based on the amount of time that Buell and Lambutis were in the "man basket" before the accident occurred. In calculating the probability factor, Wallace applied a "1" for duration, finding that the unsafe condition lasted between 10 to 50 percent of the work day. Ignoring the time estimates provided by Buell and Lambutis in their written statements, and accepting their time estimates of one-half hour to one-hour, this amount of time is still over 10 percent of the January 4, 2012, workday. The Crew started work at 7:30 a.m. and ended at 12:22 p.m., a total of five hours. Ten percent of five hours is one-half hour. Therefore, Wallace's calculation of duration is accurate and did not cause the penalty calculation to be erroneous.

Given Gateway's size, the gravity of the violation (a serious violation), a credit for Gateway's good faith in establishing safety rules, and Gateway's lack of prior violation history, a penalty of $2,800 is appropriate in this matter.

[186] Minn. Stat. § 182.666, subd. 2.

A. C. O.